No. 80-688

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

CORPORACION VENEZOLANA DE FOMENTO,
Petitioner,

v.

THE MERBAN CORPORATION, ROBERT J. REDMOND, VINTERO CORPORATION, VINTERO SALES CORPORATION and VINCENT A. DE LYRA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THE MERBAN CORPORATION AND ROBERT J. REDMOND

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Questions Presented

Did a unanimous Court of Appeals err:

(1) When it determined that petitioner's complaint meant what it said and that Security Pacific International Bank was a real party defendant?

(2) When, by affirming, it applied standard principles of contract law to the facts of this case and held petitioner liable on its guarantees of notes?

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Statement

The petition seeks to review an order of the United States Court of Appeals for the Second Circuit insofar as that Court unanimously affirmed the grant of judgment to The Merban Corporation ("Merban"). Merban's judgment against petitioner, Corporacion Venezolana de

Fomento ("CVF"), a corporate instrumentality of the Venezuelan Government, was based on two series of notes which Merban purchased relying on CVF's guarantees.

CVF's petition raises only issues of the application of undisputed principles of law of non-Constitutional dimension to the facts of this case. For example, CVF argues that this Court should "narrowly redefine" the effect a nominal party's presence in an action may have on the existence of federal subject matter jurisdiction. However, the argument is based on an unfounded assumption—that there was a nominal party. There was not. CVF merely quarrels with the Court of Appeals' determination that Security Pacific International Bank ("SPIB") was a real party defendant. Similarly, CVF's other proposed "issues" for review are not issues of law, but of the application of standard principles of contract law to the facts of this case.

Prior Proceedings

CVF sued SPIB, Vincent A. De Lyra, Vintero Corporation ("Vintero"), Merban and two of Merban's officers in federal court for a judgment declaring, among other things, that (1) CVF was not obligated on its guarantees of notes ("Notes") purchased by Merban; and (2) SPIB should not honor further drawings on two irrevocable letters of credit which SPIB opened in favor of Vintero in accordance with the underlying loan agreements. In its complaint, CVF also sought damages for alleged fraud and for alleged improper drawings under the letters of credit.

During extensive pre-trial proceedings, four Canadian and two American national banks, which had purchased participations in the Notes from Merban, intervened. Judge Conner granted judgment to the purchasing banks ("Intervening Banks") and narrowed the issues for trial of CVF's claims vis-a-vis Merban. 452 F. Supp. 1108 (printed in the Appendix to the Petition at 72a-97a).* Judge Sweet, after a full trial, held that "each of CVF's theories of participation or constructive knowledge of alleged fraud by Merban fails for want of proof" and that CVF could not avoid its international obligations by assert- that certain Venezuelan governmental approvals had not been obtained. (70a-71a)**

A few weeks after losing the case it had brought over four years earlier in the District Court, CVF moved to divest the District Court of jurisdiction and to vacate the judgment entered against it and in favor of Merban on Merban's counterclaims. Judge Sweet held that the District Court had jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-11, and under 12 U.S.C. §632 (codified as part of the Edge Act).

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* The Intervening Banks ultimately settled their claims against CVF.

** CVF also sued two officers of Merban, Robert J. Redmond and James E. Himoff. The case against Himoff was dismissed on Merban's motion on the last day of trial (47a). Redmond obtained judgment after trial in his favor and this judgment was affirmed, but he appears as a respondent before this Court. CVF's pursuit of a rejected claim against Redmond is unexplained. The jurisdictional issue CVF attempts to raise here does not even question federal jurisdiction on the basis of diversity of citizenship between CVF and Redmond, a New York citizen, and CVF's petition does not challenge the unanimous findings of all Courts below that Redmond did not participate in any fraudulent act against CVF.

He held that the jurisdictional ground initially invoked by CVF, diversity of citizenship, was not available, but exercised discretion under 28 U.S.C. §1653 and F.R. Civ. P. 15(a), to permit defendants to amend the jurisdictional allegations, because "[s]ignificant time and expense already have been expended by the parties and the court to adjudicate the issues; relitigation would not serve the interests of justice if the court has subject matter jurisdiction." (29a)

On appeal, the Court of Appeals sustained jurisdiction on the basis of the Edge Act, 12 U.S.C. §632, basing its conclusions on a different ground than had Judge Sweet.* However, as to Merban and its officers, the Court affirmed the findings and conclusions below that there was no fraud by Merban and its officers and that the Notes were valid and enforceable. The Court of Appeals reinstated CVF's case against the remaining non-Merban defendants.

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* Among other things, the Court of Appeals held that the Sovereign Immunities Act would not retroactively confer federal subject matter jurisdiction on a case pending on the Act's effective date. The Circuit Court indicated, however, that disputes which had arisen prior to the Act should be decided by reference to its substantive principles, citing the Act's Preamble, 28 U.S.C. §1602. (9a) The Court of Appeals thus indicated that Merban could now, after the effective date of the Act, sue CVF under the Act. CVF never points out what would be the absurd result of ousting the Court of jurisdiction over this fully-tried case—that the case could be started again tomorrow in federal court by Merban and after years more of litigation would reach the same substantive result.

ARGUMENT

CVF's petition raises only issues of the application of standar principles of law to the facts of this case.

I. The Court of Appeals correctly read CVF's own complaint to find that SPIB was a real party. No issue of law is present as to the principle that a nominal party's presence in an action does not confer jurisdiction.

CVF argues that this Court should "narrowly redefine" the principle that a "nominal" party's presence in an action cannot confer federal subject matter jurisdiction. CVF never suggests, however, that the Court of Appeals rejects this principle or that its reasoning departs from that of this Court or any other Court of Appeals. All CVF really contends is that the Court of Appeals was incorrect when it applied this principle of law to the facts of this case. CVF admits this when it contends that the Circuit Court "improperly departed from a long established rule approved by this Court and followed in other circuits that the test of whether a defendant is a nominal party depends ultimately on the facts of each case." (Petition, p. 14) There is no reason for this Court to hear this case so that it can apply established law to the facts at bar and come to the correct conclusion reached below.

CVF's contention that the Court of Appeals was wrong in finding that SPIB was a real party rests entirely on CVF's pretense that SPIB played only one role in the underlying transactions, that of a depository and collection agent. As the Court of Appeals pointed out, however,

> "SPIB played another role in the Cariven-Merban transaction—that of the provider of a letter of credit for Vintero's benefit on Cariven's account. SPIB was named in CVF's complaint as a defendant who, allegedly, had wrongfully allowed drawdowns by Vintero against the letter of credit—drawdowns which were wrongful because of Vintero's alleged failure to comply with what CVF said were conditions precedent on the money's availability binding on SPIB. CVF's complaint clearly viewed SPIB as potentially liable for damages. SPIB is a federally chartered bank, and the transaction in which Vintero, in New York, drew on a letter of credit on the account of a Venezuelan corporation, Cariven, was one involving 'international or foreign banking.' SPIB was thus a true party to the action, and jurisdiction inhered in the district court under 12 U.S.C. §632." ((13a, footnotes omitted)

The principle that a nominal party's presence in an action cannot serve as the basis for federal jurisdiction arises from the need to prevent an overambitious plaintiff from artificially creating federal jurisdiction. It is doubtful whether any Court should countenance the principle CVF propounds—that a plaintiff can contend after losing at trial that a party was only a nominal defendant so that the plaintiff can disavow the federal jurisdiction it initially invoked. But this doubtful thesis need not be reached here. SPIB was, on the record facts, a real party.*

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* If the Court were to hear the jurisdictional issues herein, we note that we would ask the Court to affirm jurisdiction on other grounds, as to which the Court of Appeals did not accept Merban's position. *See,* pp. 3-4, *supra.*

II. The Court of Appeals correctly applied standard principles of contract law to the facts of this case to hold the Notes valid and enforceable.

CVF repeats what it urged to all the Courts below and argues that those Courts departed from authority of this Court. The principles relied on by CVF, however, have no application to the issues in this case.

For example, CVF argues that "the power and capacity of a foreign body corporate are determinable by reference to its own law." (Petition, p. 17) This lawsuit does not, however, raise an issue of the "power and capacity" of a foreign corporation.

CVF relies on cases involving corporate internal affairs and reorganizations, matters traditionally governed by the law of the corporation's place of formation, to support its thesis that it could not contract except in compliance with what it alleges are applicable principles of Venezuelan law. CVF seeks to raise a question (not present in this case in any event) as to the authority of a corporation to contract. The correct applicable principle is that questions of authority to contract are resolved by the law of the jurisdiction having the greatest interest in or most significant relationship to the contract. As the Courts below determined, applying the conflicts principles of the forum, the applicable law is that of New York. *See, J. Zeevi & Sons, Ltd.* v. *Grindlay's Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866 (1975); *Fleet Messenger Service, Inc.* v. *Life Ins. Co. of North America*, 315 F.2d 593 (2d Cir. 1963); Illustration 2 to §198 of the Restatement 2d, *Conflict of Laws;* Ehrenzweig, *Conflict of Laws* §179 at 479 (1962).

Nor is there validity to CVF's assertion that it should be treated as if it were an agency of the United States government, able to rely on the old common law rule that waiver and estoppel are not usually applied against the government. Assuming, *arguendo,* that the Court of Appeals reached the question of whether estoppel was available against CVF,* there is no authority for the proposition that foreign governmental agencies cannot be estopped. In any event, the Foreign Sovereign Immunities Act, whose substantive principles govern here, now provides specifically that a foreign state or instrumentality "shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. §1606.

The core of CVF's position is that a federal court, whose jurisdiction was invoked by a Venezuelan government agency, should not apply standard principles of American contract law to hold the agency to its guarantees, simply because that agency seeks to avoid its obligations by dubious reference to its own law. We doubt this Court wishes to inquire into or support that position.

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* The Circuit Court did not say it reached this issue and did not have to reach it to hold CVF liable on its guarantees.

Conclusion

Certiorari should not be granted.

Dated: New York, New York
November 20, 1980

Respectfully submitted,

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